ORIGINAL

Supreme Court, U.S.
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No. 93-143

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

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STATE OF NORTH CAROLINA,
Petitioner,

v.

LONNIE WINSLOW BALLARD and
JOSEPH EARL BATES,
Respondents.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENTS' BRIEF IN OPPOSITION

****

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QUESTION PRESENTED

WHETHER NORTH CAROLINA, IN ACCORDANCE WITH THE LAW IN VIRTUALLY EVERY JURISDICTION, HAS ADOPTED AN APPROPRIATE METHOD OF IMPLEMENTING AKE V. OKLAHOMA THAT ALLOWS INDIGENT DEFENDANTS TO MAKE A THRESHOLD SHOWING OF NEED FOR EXPERT PSYCHIATRIC ASSISTANCE IN AN EX PARTE HEARING?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY A WRIT SHOULD NOT ISSUE 2

NORTH CAROLINA, IN ACCORDANCE WITH THE LAW IN VIRTUALLY EVERY JURISDICTION, HAS ADOPTED AN APPROPRIATE METHOD OF IMPLEMENTING AKE V. OKLAHOMA THAT ALLOWS INDIGENT DEFENDANTS TO MAKE A THRESHOLD SHOWING OF NEED FOR EXPERT PSYCHIATRIC ASSISTANCE IN AN EX PARTE HEARING 2

A. No Serious Division of Authority Exists Among the Jurisdictions in Their Implementation of the Ake Principle 3

B. The Decisions Below Implemented Ake by Allowing Respondents to Make Threshold Showings of Their Need for Psychiatric Experts in an *Ex Parte* Hearing 6

CONCLUSION 11

TABLE OF AUTHORITIES

CASES

Ake v. Oklahoma,
470 U.S. 68 (1985) 2,7

Arnold v. Higa,
600 P.2d 1383 (Haw. 1979) 5

Dunn v. State,
722 S.W.2d 595 (Ark. 1987) 3

McGregor v. State,
733 P.2d 417 (Okla. Cr. 1987) 4

Medina v. California,
505 U.S. ____, 120 L.Ed.2d 353 (1992) 5

Patterson v. New York,
432 U.S. 197 (1977) 5

People v. Worthy,
167 Cal. Rptr. 402, 109 Cal. App. 3d 514 (1980) 5

State v. Ballard,
333 N.C. 515, 428 S.E.2d 178 (1993) 1,6,10

State v. Bates,
333 N.C. 523, 428 S.E.2d 693 (1993) 1,6,10

State v. Brooks,
385 S.E.2d 81 (Ga. 1989), *cert. denied*, 483 U.S. 1010 (1990) 3

State v. Floody,
481 N.W.2d 242 (S.D. 1992) 3

State v. Gambrell,
318 N.C. 249, 347 S.E.2d 390 (1986) 3

State v. Hickey,
317 N.C. 457, 346 S.E.2d 646 (1986) 7

State v. Hoopii,
710 P.2d 1193 (Haw. 1985) 3

State v. Johnson,
317 N.C. 193, 344 S.E.2d 775 (1986) 7

State v. Moore,
321 N.C. 327, 364 S.E.2d 648 (1988) 3,7

State v. Parks,
331 N.C. 649, 417 S.E.2d 467 (1992) 2,7

State v. Phipps,
331 N.C. 427, 418 S.E.2d 178 (1992) 8

State v. Williams,
304 N.C. 394, 284 S.E.2d 437 (1981), *cert. denied*,
456 U.S. 932 (1982) 7

United States v. Meriwether,
486 F.2d 498 (5th Cir.), *cert. denied*, 417 U.S. 948 (1974) 4

Washington v. State,
800 P.2d 252 (Okla. Cr. 1990) 3

Zant v. Brantley,
411 S.E.2d 869 (Ga. 1992) 5

NORTH CAROLINA GENERAL STATUTES

N.C. Gen. Stat. § 7A-450 7

N.C. Gen. Stat. § 7A-454 7

N.C. Gen. Stat. §15A-901 et. seq. (1973) 6

OTHER AUTHORITY

Fed. R. Crim. P. 17(b) 4

Kan. Stat. Ann. §22-4508 (1988) 4

S.C. Code Ann. §16-3-26(c) (Law. Co-op. Supp. 1991) 3

Tenn. Code Ann. §40-14-207(3)(b) (1990) 4

18 U.S.C. §3006A(e)(1) (1988) 4

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RESPONDENTS' BRIEF IN OPPOSITION

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Respondents, Lonnie Winslow Ballard and Joseph Earl Bates, respectfully oppose and request this Court to deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decisions by the Supreme Court of North Carolina. *See State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) and *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993).

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

STATEMENT OF THE CASE

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondents are satisfied with petitioner's statements of the OPINIONS BELOW, JURISDICTION, CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS, AND STATEMENT OF THE CASE.

REASONS WHY A WRIT SHOULD NOT ISSUE

NORTH CAROLINA, IN ACCORDANCE WITH THE LAW IN VIRTUALLY EVERY JURISDICTION, HAS ADOPTED AN APPROPRIATE METHOD OF IMPLEMENTING AKE V. OKLAHOMA THAT ALLOWS INDIGENT DEFENDANTS TO MAKE A THRESHOLD SHOWING OF NEED FOR EXPERT PSYCHIATRIC ASSISTANCE IN AN EX PARTE HEARING.

In the decisions below, the Supreme Court of North Carolina espoused a reasonable procedure through which indigent defendants could request the assistance of psychiatric experts without revealing their defense strategies to the state. Indigent defendants are constitutionally entitled to the assistance of psychiatric experts upon a threshold showing of need, *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985), and North Carolina has consistently followed this principle. *See, e.g., State v. Parks*, 331 N.C. 649,

656, 417 S.E.2d 467, 471 (1992); *State v. Moore*, 321 N.C. 327, 344, 364 S.E.2d 648, 656 (1988); *State v. Gambrell*, 318 N.C. 249, 255, 347 S.E.2d 390, 393 (1986). Contrary to petitioner's assertions, the decisions below do not interpret *Ake* beyond its perimeters. Rather, they merely afford indigent defendants, like respondents, an opportunity to make the threshold showing of need required by *Ake* without injury to other important rights like the attorney-client privilege, the constitutional protection against self-incrimination, and the constitutional right to the effective assistance of counsel. Given the soundness of the decisions below, there is no need for review by this Court.

Despite petitioner's assertions to the contrary, the decisions below neither create a division among the lower courts in interpreting or implementing *Ake* nor raise a serious constitutional question. The purported "discord" among the states, Petition at 15-18, is wholly illusory. In fact, the decisions below are in harmony with virtually every jurisdiction addressing the implementation of *Ake*. Furthermore, the decisions below merely implement the principles articulated in *Ake*, a prerogative petitioner itself acknowledges this Court left to the states. Petition at 9-10 (quoting *Ake*, 470 U.S. at 83). For both of these reasons, the petition should be denied.

A. No Serious Division of Authority Exists Among the Jurisdictions in Their Implementation of the Ake Principle.

The vast majority of lower courts considering the question of whether indigent defendants are entitled to request the assistance of a psychiatric expert in an *ex parte* hearing have resolved it in respondents' favor. *See, e.g., Washington v. State*, 800 P.2d 252 (Okla. Cr. 1990); *State v. Brooks*, 385 S.E.2d 81 (Ga. 1989), *cert. denied*, 483 U.S. 1010 (1990). *Dunn v. State*, 722 S.W.2d 595 (Ark. 1987); *State v. Hoopii*, 710 P.2d 1193 (Haw. 1985); *but see State v. Floody*, 481 N.W.2d 242 (S.D. 1992). Many jurisdictions

also have adopted a similar practice by statute, *see* Kan. Stat. Ann. §22-4508 (1988); S.C. Code Ann. §16-3-26(c) (Law. Co-op. Supp. 1991); Tenn. Code Ann. §40-14-207(3)(b) (1990), as has the United States. 18 U.S.C. §3006A(e)(1) (1988); *see* Fed. R. Crim. P. 17(b). There is no substantial divergence in the way states have chosen to implement the *Ake* standard.

This prevailing rule, followed in the decisions below, is sound. As *Brooks* explained, indigent defendants not only have the right to obtain expert assistance necessary to prepare a defense, but "also have the right to obtain that assistance without losing the opportunity to prepare the defense in secret. Otherwise, the defendant's single 'fair opportunity to present his defense,' acknowledged in *Ake* will be impaired." 385 S.E.2d at 84. The hearing should be *ex parte* not to protect defendant from the prosecution but to protect him "from revealing his theory of the case to the prosecutor." *Id.* at 83. Requiring a defendant to make his showing in the presence of the prosecution would implicate important constitutional rights. Without the protection of an *ex parte* hearing, defendant could be deprived of his privilege against self-incrimination, his right to counsel, and his right to present a defense. To place an indigent defendant in the position of revealing his theory of the case in the presence of the prosecutor when a non-indigent defendant could avoid similar scrutiny would cause serious equal protection problems. *See United States v. Meriwether*, 486 F.2d 498 (5th Cir.), *cert. denied*, 417 U.S. 948 (1974). An indigent defendant "has a legitimate interest in making [the necessary *Ake*] showing *ex parte*." *Brooks*, 385 S.E.2d at 84.

Oklahoma reached a similar conclusion. *E.g.*, *McGregor v. State*, 733 P.2d 417 (Okla. Cr. 1987). In *McGregor*, an indigent defendant sought to make his threshold showing under *Ake* in an *ex parte* fashion. The trial court refused, and defendant sought a writ of prohibition. The appellate court granted the writ and explained there was

> no need for an adversarial proceeding, that to allow participation, or even presence, by the State would thwart the Supreme Court's attempt to place indigent defendants, as nearly as possible, on a level of equality with nonindigent defendants.

Id. at 716. Hawaii reached the same result in a similar situation. *E.g., Arnold v. Higa*, 600 P.2d 1383 (Haw. 1979). In granting a writ of prohibition, the appellate court noted petitioner had not been given an opportunity to show his need for expert assistance. It concluded that "an *ex parte* hearing to make necessary findings is appropriate." *Id.* at 1385. Although no statute required the hearing to be conducted in an *ex parte* fashion, "when defendant requests one, the judge should allow counsel to particularize his reasons for the services without disclosing his defense theory or tactics to the prosecution." *Id.*; *accord People v. Worthy*, 167 Cal. Rptr. 402, 109 Cal. App. 3d 514 (1980) (to avoid revelation of defense strategy, an indigent showing in need of expert assistance to obtain appointment of experts may be by "an *ex parte in camera* hearing"). *See also Zant v. Brantley*, 411 S.E.2d 869 (Ga. 1992) (prosecution properly excluded from post-conviction hearing seeking new trial based upon ineffective assistance of counsel in failing to obtain necessary expert assistance because defendant should not be required to reveal his theory of the case to the prosecution).

Respondent relies solely on *Floody* as the example of a state procedure in which a request for expert assistance could not be made *ex parte*. There, however, the state's presence was required by a statute which enjoyed a presumption of constitutionality. 481 N.W.2d at 255. A rule that is part of a state's criminal process will not be invalidated under a due process challenge "unless 'it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Medina v. California*, 505 U.S. ____, 120 L.Ed.2d 353, 363 (1992) (quoting *Patterson v. New York*, 432 U.S. 197, 201-02 (1977)) The expert assistance requested in *Floody*

concerned an analysis of the interview techniques used by state investigators who questioned the alleged victim of sexual abuse. Unlike a request for psychiatric assistance, this showing would not have required disclosure of a defendant's confidences about his mental state. On those facts, the South Dakota Supreme Court found no basis to disturb the legislative policy. That decision, premised on the absence of a legitimate constitutional challenge to an otherwise valid state statute, hardly evidences a split among the lower courts worthy of certiorari review.

It is fundamentally unfair to require an indigent accused, like respondents, to provide the prosecution with information about his case that a wealthy accused would not have to disclose. By requiring an indigent defendant to apply for funds in open court, such a procedure would force him to reveal to the prosecution not only the identity of experts he intends to consult, but also their significance to his case. These revelations are not required under North Carolina's discovery statutes. *See* N.C. Gen. Stat. §15A-901 *et. seq.* (1973). Under petitioner's analysis, a defendant should be forced to disclose crucial defense strategy and psychiatric information solely because of his status as an indigent. The majority rule to the contrary should not be disturbed.

B. The Decisions Below Implemented Ake by Allowing Respondents to Make Threshold Showings of Their Need for Psychiatric Experts in an Ex Parte Hearing.

In *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993) and *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993), the North Carolina Supreme Court made a policy decision to allow indigent defendants to request the assistance of psychiatric experts without revealing their defense strategies to the state. Where an indigent defendant makes a threshold showing that his mental condition is likely to be at issue in a criminal

proceeding, the state must assure him access to a competent psychiatrist to assist in the preparation of his defense. *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985). *Ballard* and *Bates* do no more than create a North Carolina procedural rule which implements *Ake* without jeopardizing other constitutional rights and state law privileges, including the privilege against self-incrimination, the right to effective assistance of counsel, and the attorney-client privilege. By establishing rules to implement *Ake* within North Carolina, the court below acted within the authority granted it by *Ake* itself. 470 U.S. at 83. Thus, the decisions below raise no issue of federal constitutional law worthy of certiorari review by this Court.

Prior to this Court's decision in *Ake*, North Carolina state statutes had been interpreted to require the appointment of any type of expert to assist the defendant upon a showing that the expert would materially assist the defendant in the preparation of his defense or that absent such assistance, the defendant would not receive a fair trial. N.C. Gen. Stat. § 7A-450, 454; *State v. Williams*, 304 N.C. 394, 284 S.E.2d 437 (1981), *cert. denied*, 456 U.S. 932 (1982). The North Carolina Supreme Court has since reconciled its interpretation of these statutes with *Ake*. *See, e.g., State v. Parks*, 331 N.C. 649, 656, 417 S.E.2d 467, 471 (1992) ("*Ake*'s 'significant factor' test is satisfied when an indigent defendant makes a particularized showing that (1) he would be deprived of a fair trial without the expert assistance, or (2) there is a reasonable likelihood that it would materially assist him in the preparation of his case"); *see also State v. Moore*, 321 N.C. 327, 364 S.E.2d 648 (1988). These principles have been applied to motions for many kinds of experts. *See, e.g, State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986) (independent investigator sought by defense); *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986) (medical expert sought by defense)

The North Carolina Supreme Court recently has considered the question of whether threshold showings of the need for expert assistance may be made *ex parte*. Although "[t]here are strong reasons for conducting [such] hearings *ex parte* and the [trial] court may in its discretion do so," the court concluded, "an *ex parte* hearing is not constitutionally required in every case." *State v. Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992).

Ballard and *Bates* found reversible error where respondents were not allowed to request the assistance of psychiatric experts *ex parte*. *Ballard*, 333 N.C. at 516, 428 S.E.2d at 179; *Bates*, 333 N.C. at 524, 428 S.E.2d at 693. The decisions below rest on two grounds. First, the lower court reasoned that conducting hearings on the need for psychiatric assistance in open court would have a chilling effect on defendants' willingness to exercise their right to such assistance. "The public, adversarial nature of an open hearing is inevitably intimidating when the issue is the defendant's mental instability. This atmosphere can daunt the defendant's desire to put before the trial court all of his evidence in support of his motion." *Ballard*, 333 N.C. at 519, 428 S.E.2d at 180-81. Second, unless showings for psychiatric experts were conducted *ex parte*, respondents' other constitutional rights and state law privileges would be jeopardized, including: the privilege against self-incrimination; the right to effective assistance of counsel; and the attorney-client privilege. The information a defendant typically must present in order to obtain the assistance of a mental health expert may "[expose the defendant's] role in potentially incriminating events," or invade areas of privileged attorney-client communications. *Ballard*, 333 N.C. at 521-22, 428 S.E.2d at 182. Without the protection of *ex parte* hearings on motions for expert psychiatric assistance, respondents would be forced to make the Hobson's choice between disclosing privileged information to the state, or foregoing their constitutional right to the assistance of a psychiatrist. Similarly, respondents' attorneys would be unable to

render effective assistance of counsel if forced to choose between breaching their duty of loyalty to their client, or proceeding to trial without the assistance of a needed expert.

The assertion in *Ballard* that "an indigent defendant who requests that evidence supporting his motion for expert psychiatric assistance be presented in an *ex parte* hearing is constitutionally entitled to have such a hearing," 333 N.C. at 516, 428 S.E.2d at 179, and the fact that the North Carolina Supreme Court found constitutional error in *Bates*, must be understood in context of the argument discussed above. *Ballard* and *Bates* require *ex parte* hearings on motions for psychiatric experts in order to implement *Ake* while protecting well-established constitutional rights and privileges.

Contrary to the state's implication, Petition for Certiorari at 15, *Ballard* did not overrule *Phipps*. *Phipps* held that the trial court did not abuse its discretion by denying defendant's motion for an *ex parte* hearing on defendant's request for a fingerprint expert to assist in the preparation of his defense. 331 N.C. 451, 418 S.E.2d 191. The lower court carefully distinguished *Phipps* based on the significantly different types of experts requested.

> That the defendant in *Phipps* was requesting an *ex parte* hearing in order to apply for funds for a *fingerprint* expert distinguishes that case critically from the case now before us. The key difference between a hearing on the question of an indigent defendant's right to a fingerprint expert and one on the question of his right to a psychiatric expert is that the object of adversarial scrutiny is not mere physical evidence, but the defendant himself. The matter is not tactile and objective, but one of an intensely sensitive, personal nature.

333 N.C. at 519, 428 S.E.2d at 180. (emphasis in original). Because of the objective, factual nature of the information that would support a request for a

fingerprint expert "defendant's constitutional rights are far less likely to be jeopardized by the presence of the prosecutor when defendant attempts a threshold showing for a fingerprint expert than when he offers evidence to support his need for a psychiatrist." *Id.* at 519, 428 S.E.2d at 181. Thus, the state's claim in its Petition for Certiorari that, "North Carolina is now encumbered with a[n] . . . *ex parte* mandate for all *Ake* threshold showings" is overbroad. *See* Petition for Writ of Certiorari at 15.

North Carolina has addressed this issue only with respect to two types of experts, technical forensic experts and mental health experts. With respect to technical forensic experts, trial courts have the discretion to allow an indigent defendant to make his threshold showing on the need for an expert *ex parte*; they are not required to do so. *Phipps*, 331 N.C. 427, 418 S.E.2d 178 (1992). Only with respect to psychiatric experts must trial courts allow defendants to make their showings of particularized need in an *ex parte* hearing. *State v. Ballard*, 333 N.C. 515, 428 S.E.2d 178 (1993); *State v. Bates*, 333 N.C. 523, 428 S.E.2d 693 (1993).

Articulating the contours of an indigent's entitlement to *ex parte* hearings on the need for various types of expert assistance will require balancing policy considerations, interpreting state statutes on the rights of indigents, and determining precisely how to implement the mandate of *Ake*. As this Court wisely ruled in *Ake*, this is a question of state policy.

In sum, the lower court has not "deliberate[ly] creat[ed] . . . a federal constitutional right." Petition for Certiorari at 7. North Carolina has chosen to implement *Ake* by adopting the unexceptional and widely used practice of allowing indigents to request the assistance of psychiatric experts in an *ex parte* hearing. This method of implementing *Ake* raises no federal constitutional issue worthy of review by this Court.

CONCLUSION

For the reasons stated herein, respondents respectfully request that the Petition for Writ of Certiorari be denied.

This the 22nd day of October, 1993.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

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AFFIDAVIT OF MAILING OF RESPONDENTS' BRIEF IN OPPOSITION

****

Gordon Widenhouse, being duly sworn, deposes and says:

I am a member of the Bar of the Supreme Court of the United States.

On 22 October 1993, I deposited in the United States Post Office at Martin Street, Raleigh, North Carolina 27602, an envelope addressed to the Clerk of the Supreme Court of the United States, first-class postage pre-paid, containing the original and twelve (12) copies of Respondents' Brief in Opposition in the above-entitled case together with Respondents' Motions to Proceed *In Forma Pauperis* (with supporting affidavit) and Certificate of Service.

This the 22nd day of October, 1993.

Gordon Widenhouse
Assistant Appellate Defender
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COUNSEL OF RECORD FOR RESPONDENTS

Subscribed and sworn to before me this 22nd day of October, 1993.

Notary Public

My Commission Expires: 11-28-95